

EXHIBIT

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

AIMEE LAMBERT, an individual, on behalf
of herself and all others similarly situated;

Plaintiff,

vs.

BUTH-NA-BODHAIGE, INC., a Delaware
corporation; RAZE MEDIA, INC., a Texas
corporation; and DOES 1 -50, inclusive

Defendants.

Case No. 2:14-cv-00514-MCE-KJN

CLASS ACTION

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
UNOPPOSED MOTION FOR FINAL
APPROVAL OF CLASS ACTION
SETTLEMENT**

Date: November 12, 2015
Time: 2:00 p.m.
Courtroom: 7
Judge: The Hon. Morrison C. England

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1 **I. INTRODUCTION**

2 On July 29, 2015, this Court granted preliminary approval of the Settlement (the “Order”).
3 *See* [Doc. 29]. Per the Court’s Order, notice was issued to the approximate 225,252 members of
4 the Settlement Class via email and first class mail (if no valid email address was available). Notice
5 via email was issued to the Settlement Class on or about August 10, 2015 and Notice via first class
6 mail was issued on or about August 28, 2015. *See* Declaration of Teresa Y. Sutor of Heffler Claims
7 Group in Support of Motion for Final Approval (“Heffler Decl.”) at ¶¶ 10, 12. Additional notice
8 was given to members of the Class through the Settlement Website and the online media campaign.
9 *Id.* at ¶¶ 7, 13. Pursuant to the Court’s Order, Class Members were provided until October 12,
10 2015 to opt out or object to the Settlement. As of the date of this filing, no members of the Class
11 have excluded themselves and none have objected. *Id.* at ¶ 18. This unanimously favorable
12 reception that the Settlement has received from the Class further evidences that the terms of the
13 Settlement are fair, adequate, and reasonable. Thus, and by this Motion, Plaintiff respectfully
14 requests the Court conduct a final review of the Settlement and approve the Settlement as fair,
15 reasonable, and adequate.

16 The Settlement represents a very good result for the Class. Plaintiff and the Class alleged
17 that Defendant Buth-Na-Bodhaige, Inc. dba The Body Shop (“TBS”) unlawfully sent SMS or text
18 messages to Plaintiff and the Class without their prior express written consent in violation of the
19 Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. § 227(b)(1)(A). The Settlement requires
20 TBS to pay \$7,335,000 into a non-reversionary common fund (“Settlement Fund”), out of which
21 Class Members will receive a twenty-five (\$25.00) Gift Card for use at any TBS retail location in
22 the United States. The Gift Card is redeemable for any merchandise offered for sale at any TBS
23 U.S. retail location or online at www.thebodyshop-usa.com, and the Gift Card is freely
24 transferrable. *See* Settlement at ¶1.11. Critically, Settlement Class Members ***need not take any***
25 ***action*** to receive a benefit from this Settlement.

26 The relief the Settlement provides is a very good result, particularly in view of the risks and
27 delays involved in continued litigation, including the very substantial risk that the Federal
28

1 Communications Commission ("FCC") would issue a ruling in response to one or more of the
 2 multiple pending petitions before it that Plaintiff and the Class had no claim; or the ongoing risk
 3 that the FCC's July 2014 Declaratory Ruling on those pending petitions could be reversed in whole
 4 or in part as a result of the petitions currently pending before the District of Columbia Court of
 5 Appeals. As such, considering the risks, the Settlement is an excellent result.

6 For the foregoing reasons and the others detailed below, the settlement readily meets the
 7 standards for final settlement approval, and it should therefore be approved.

8 **II. ALLEGATIONS AND PROCEDURAL HISTORY**

9 **A. The TCPA**

10 The TCPA was enacted to "protect the privacy interests of residential telephone subscribers
 11 by placing restrictions on unsolicited, automated telephone calls to the home and to facilitate
 12 interstate commerce by restricting certain uses of facsimile machines and automatic dialers."
 13 *Satterfield v. Simon & Schuster, Inc.*, 569 F. 3d 946, 954 (9th Cir. 2009) (*quoting* S.Rep. No. 102–
 14 178, at 1, 1991 U.S.C.C.A.N. 1968 (1991)). Whether a plaintiff can maintain a claim under the
 15 TCPA turns on the statutory language of 47 U.S.C. § 227(b)(1)(A)(iii). *Kramer v. Autobytel, Inc.*,
 16 759 F. Supp. 2d 1165, 1169 (N.D. Cal. 2010). Section 227 of the TCPA, entitled "Restrictions on
 17 use of telephone equipment," provides as follows:

18 (a) Definitions. As used in this section—

19 (1) The term "automatic telephone dialing system" means equipment which has the capacity—

20 (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and

21 (B) to dial such numbers.

22 (b) Restrictions on use of automated telephone equipment.

23 (1) Prohibitions. It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States—

24 (A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice—
 25 ...

26 (iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call.
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 28

1 *Kramer*, 759 F. Supp. 2d at 1169 (quoting 47 U.S.C. § 227). Among other things, the TCPA made
2 it unlawful for any person to make any call (other than a call made for emergency purposes or
3 made with the prior express consent of the called party) using any automatic telephone dialing
4 system to any cellular telephone number. *Baird v. Sabre Inc.*, CV 13-999 SVW, 2014 WL 320205,
5 at *1 (C.D. Cal. Jan. 28, 2014).

6 A text message is a call within the meaning of the act. *Id.*; *Maier v. J.C. Penney Corp., Inc.*,
7 13CV0163-IEG DHB, 2013 WL 3006415 (S.D. Cal. June 13, 2013) (citing *Satterfield v. Simon &*
8 *Schuster, Inc.*, 569 F.3d 946, 952 (9th Cir.2009)) (“The Ninth Circuit has established that text
9 messages (also referred to as SMS) are encompassed within the term ‘call’ as used in the TCPA
10 and are therefore subject to its restrictions.”).

11 On October 16, 2013, the FCC’s February 2012 Rule Making, interpreting the 1991
12 Telephone Consumer Protection Act, 47 U.S.C. section 227, went into effect. *See In re Rules and*
13 *Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order*, 27
14 F.C.C.R. 1830, 1837 ¶ 18, 1839 ¶ 20, 1858 ¶ 71 (F.C.C. Feb. 15, 2012) (“The 2012 Rule Making”).
15 The 2012 Rule Making mandated that from October 16, 2013 going forward companies could no
16 longer rely on mere oral consent to send their text message solicitations to customers. Instead, the
17 FCC required that as of that date companies needed to obtain “prior express written consent” before
18 sending text message solicitations to their customers. *See* 2012 Rule Making at ¶ 18. The FCC
19 could not have been more clear – “[w]e believe that requiring prior written consent will better
20 protect consumer privacy because such consent requires conspicuous action by the consumer –
21 providing permission in writing – to authorize autodialed or prerecorded telemarketing calls, and
22 will reduce the chance of consumer confusion in responding orally to a telemarketer’s consent
23 request.” *Id.* at ¶ 24.

24 Not only did the FCC require written consent, but it also prescribed exactly what must be
25 contained in that written consent: “[A] consumer’s written consent to receive telemarketing
26 robocalls must be signed and be sufficient to show that the consumer: (1) received ‘clear and
27 conspicuous disclosure’ of the consequences of providing the requested consent, *i.e.*, that the
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1 consumer will receive future calls that deliver prerecorded messages by or on behalf of a specific
2 seller; and (2) having received this information, agrees unambiguously to receive such calls at a
3 telephone number the consumer designates.” *Id.* at ¶ 33.

4 Knowing that its new rules would significantly impact how businesses telemarket to
5 wireless phones, the FCC left a 12-month window (the window was later enlarged by 8 more
6 months) for businesses to re-design websites, revise telemarketing scripts, and prepare and print
7 new credit card and loyalty program applications and response cards to obtain consent from new
8 customers, as well as to exhaust existing supplies of these materials and create new record-keeping
9 systems and procedures to store and access the new consents they obtained. *Id.* at ¶ 67. While the
10 FCC left a grace period, it also warned them:

11 Because allowing telemarketers to rely on [prior forms of consent] pending the
12 effective date of our new written consent requirement would ease the operational
13 and technical transition for autodialed or prerecorded voice telemarketing calls, we
14 find that it would serve the public interest to permit continued use of existing
15 consents for an interim period. For example, in cases where a telemarketer has not
16 obtained prior written consent under our existing rules, we will allow such
17 telemarketer to make autodialed or prerecorded voice telemarketing calls until the
effective date of our written consent requirement, so long as it has obtained another
form of prior express consent. ***Once our written consent rules become effective,
however, an entity will no longer be able to rely on non-written forms of express
consent to make autodialed or prerecorded voice telemarketing calls, and thus
could be liable for making such calls absent prior written consent.***

18 *Id.* ¶ 68 (emphasis added).

19 Since the parties entered into the Settlement, the scope of potential liability under the TCPA
20 has continued to evolve. On July 10, 2015, the FCC issued its Declaratory Ruling, resolving
21 multiple petitions pending before it, including the petition of the Coalition of Mobile Engagement
22 Providers that this Court noted in staying this Action. *See* Rules and Regulations Implementing the
23 Telephone Consumer Protection Act of 1991, Declaratory Ruling and Order CG Docket No. 02-
24 278, WC Docket No. 07-135, FCC 15-72 (rel. Jul 10, 2015) (“Declaratory Ruling”). As for the
25 Coalition’s petition, the FCC noted “that some uncertainty in this regard may have existed prior to
26 the rule’s effective date * * *.” *Id.* at ¶ 100. The FCC indicated that it would allow a retroactive
27 waiver for petitions before it on this issue. *Id.* at ¶ 102.

1 And other issues regarding the potential scope of TCPA liability remain unresolved. The
2 FCC's Declaratory Ruling is now the subject of multiple petitions for review pursuant to the
3 Communications Act, 47 U.S.C. § 402(a), and the Hobbs Act, 28 U.S.C. § 2342(1). These appeals
4 have been consolidated before the United States Courts of Appeal for the District of Columbia
5 Circuit. A key issue in these petitions is whether and to what extent the FCC's interpretation of an
6 "automated telephonic dialing system" (ATDS) as set forth in the Declaratory Ruling, comports
7 with the statutory definition. *See* 47 U.S.C. § 227(a)(1). Multiple courts have stayed TCPA actions
8 until the FCC resolves these petitions. *See, e.g., Gensel v. Performant Techs.*, Case No. 13-C-
9 1196, 2015 U.S. Dist. LEXIS 142303 (E.D.Wis. October 20, 2015)(staying TCPA action pending
10 resolution of petitions challenging FCC's interpretation of ATDS definition).

11 **B. The Litigation**

12 Plaintiff filed this Action on February 20, 2014 and alleged that TBS sent Plaintiff and the
13 Class unsolicited telemarketing text messages to their respective mobile phones from an ATDS,
14 and more importantly, without the required express written consent. [Doc. 1]. *See* Declaration of
15 Nicholas Hornberger in Support of Unopposed Motion for Attorneys' Fees, Costs and Incentive
16 Award ("Hornberger Decl.") at ¶ 3. Thereafter, TBS moved this Court to stay or dismiss this
17 Action based upon various pending petitions for review before the FCC [Doc. 10]. *Id.* This Court
18 granted TBS's motion to stay the Action on August 20, 2014 [Doc. 17]. *Id.* As a result of this
19 Court's Order, and with both Parties fully aware as to the fact that any ruling by the FCC could
20 materially impact their respective positions in this case, the Parties opted to explore resolution of
21 this Action during the stay, and attended mediation with the Hon. Fred K. Morrison (Ret.) of JAMS
22 on March 24, 2015. *Id.*

23 Prior to mediation, the Parties exchanged significant information concerning the size of the
24 alleged class as well as information relating to Raze Media, the agent retained by TBS to send the
25 messages on behalf of TBS. *Id.* at ¶ 4. At the mediation, the Parties reached an agreement to
26 resolve this Action. Following mediation, the parties turned to finalizing the Settlement
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1 Agreement, claim forms, notice documents, and preliminary approval papers. *Id.* Class Counsel
2 worked in close consultation with the Settlement Administrator throughout this process. *Id.*

3 Plaintiff submitted her *Unopposed* Motion for Preliminary Approval on June 11, 2015
4 [Doc. 24]. *Id.* at ¶ 5. On or about July 1, 2015, this Court entered an Order requesting the parties to
5 submit supplemental briefing regarding the impact, if any, that the United States Supreme Court's
6 grant of *certiorari* in *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871 (9th Cir. 2014) on the
7 Settlement [Doc. 26]. *Id.* On or about July 14, 2015, the parties filed their respective supplemental
8 briefings, each stating that neither believed *Gomez* would have any impact on the present case nor
9 the Settlement and requesting the Court enter an order granting preliminary approval [Docs. 27 and
10 28]. *Id.* On or about July 29, 2015, the Court entered an order granting preliminary approval,
11 ordering notice be sent to the Settlement Class, setting an "opt out/exclusion" deadline, setting a
12 deadline for Class Counsel to submit a motion for attorneys' fees, costs, and incentive awards, and
13 setting a hearing date for final approval [Doc. 29]. *Id.*

14 C. The Settlement

15 The Settlement is the result of the Parties' participation in an all-day mediation session
16 before the Honorable Fred K. Morrison (Ret.) of JAMS and subsequent discussions, and has been
17 preliminarily approved by the Court as follows:

18 1. The Settlement Class

19 As set forth in the Court's Order on Preliminary Approval, the "Settlement Class" is defined
20 as follows: "all individuals in the United States who received a text message by or on behalf of
21 TBS during the period of time from February 20, 2010 February 20, 2014, as reflected by the
22 combined records of Raze and TBS." [Doc. 29] at 4:15-18.

23 2. The Settlement Fund

24 Under the Settlement, TBS is to provide gross Settlement Benefits (as defined in ¶1.26 of
25 the Settlement) in the amount of \$7,335,000.00. The Settlement Benefits will fund the following:
26 (i) \$25 Gift Cards (as defined in ¶1.11 of the Settlement) to each of the approximately 225,252
27 Settlement Class Members, i.e, greater than \$5,600,000.00 to the Settlement Class; (ii) \$130,000.00
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1 the Settlement Administrator – Heffler Claims Group, LLC; (iii) an incentive award of \$5,000.00 to
 2 Plaintiff; and (iv) \$1,600,000.00 (approximately 21.8% of the common fund) in attorneys’ fees and
 3 costs.

4 **3. Benefit to the Class**

5 Each Settlement Class Member will be directly issued a twenty-five (\$25.00) Gift Card for
 6 use at any TBS retail location in the United States. The Gift Card is redeemable for any
 7 merchandise offered for sale at any TBS U.S. retail location or online at [www.thebodyshop-](http://www.thebodyshop-usa.com)
 8 usa.com, and the Gift Card is freely transferrable. *See* Settlement at ¶1.11. Codes for the gift cards
 9 will be disseminated directly to Settlement Class Members following final approval, without any
 10 requirement that Settlement Class Members submit a claim form.

11 **4. Scope of Release**

12 The scope of the release by all Settlement Class Members (i.e., those who do not request
 13 exclusion) includes any and all claims against the Released Parties (as defined in the Settlement at
 14 ¶1.22) as follows:

15 any and all actual, potential, filed, known or unknown, fixed or contingent,
 16 claimed or unclaimed, suspected or unsuspected, claims, demands, liabilities,
 17 rights, causes of action, contracts or agreements, extracontractual claims,
 18 damages, punitive, exemplary or multiplied damages, expenses, costs, attorneys’
 19 fees and/or obligations (including “Unknown Claims” as defined below), whether
 20 in law or in equity, accrued or unaccrued, direct, individual or representative, of
 21 every nature and description whatsoever, whether based on the TCPA or other
 22 federal, state, local, statutory or common law or any other law, rule or regulation,
 including the law of any jurisdiction outside the United States, against the
 Released Parties [defined in the Settlement at ¶1.22], or any of them, arising out
 of the facts, transactions, events, matters, occurrences, acts, disclosures,
 statements, representations, omissions or failures to act regarding the alleged
 receipt of text messages sent by or on behalf of TBS during the Class Period,
 including all claims that were brought or could have been brought in the Action,
 belonging to any and all Releasing Parties.

23 *See* Settlement at ¶1.23 and ¶1.31.

24 **5. Class Representative’s Incentive Award**

25 The Settlement contemplates that Class Counsel will request an incentive award in the
 26 amount of \$5,000 to be distributed to Plaintiff, subject to Court approval. TBS does not oppose this
 27 request. *See* Settlement at ¶¶8.3-8.4. Plaintiff and Class Counsel filed their Motion for an Award
 28

1 of Attorneys' Fees, Costs, and Incentive Awards [Doc. 30] on September 28, 2015. To date, not a
2 single Class Member has objected to the requested attorneys' fees, costs, or incentive awards, nor
3 has any Class Member opted out of the Settlement. *See* Heffler Decl. at ¶ 18.

4 **6. Class Counsel's Application for Attorneys' Fees and Action Costs**

5 The Settlement contemplates that Class Counsel shall be entitled to apply to the Court for
6 an award of attorneys' fees and reimbursement of costs in the amount of \$1,600,000.00, which is
7 less than 22% of the Settlement Benefit. *See* Settlement at ¶8.1. TBS does not oppose an
8 application by Class Counsel for an award of attorneys' fees and costs, as long as it does not exceed
9 this stated amount. *Id.* On or about September 28, 2015, Class Counsel filed and served their
10 Motion for an Award of Attorneys' Fees, Costs, and Incentive Awards with the Court. *See* [Doc.
11 30]; *see also* Hornberger Decl. at ¶6. In addition, a copy of the Motion for an Award of Attorneys'
12 Fees, Costs, and Incentive Awards was posted on the settlement website. *Id.*; *see also* Heffler Decl.
13 at ¶ 7.

14 **III. CLASS NOTICE HAS BEEN DISSEMINATED**

15 The notice program approved by the Court [Doc. 29] has been implemented by the parties
16 and the Court-approved Settlement Administrator in accordance with the Court's Order Granting
17 Preliminary Approval of Class Action Settlement. *See* Heffler Decl. at ¶¶ 3-16.

18 **A. Direct Email and Direct Mailing of Notice to the Class**

19 The Settlement Administrator provided notice in accord with Section 4 of the Settlement
20 Agreement and the Court's Order granting preliminary approval. Specifically, Heffler timely
21 provided direct email and mail notice (Heffler Decl. at ¶¶ 10-12), along with targeted publication
22 notice consisting of banner notifications through designated social media outlets, including
23 Facebook and Twitter. *Id.* at ¶ 13. In addition, the Settlement Administrator has maintained a
24 dedicated website (at www.thebodyshoptextsettlement.com), through which class notice and key
25 court filings could be viewed by class members. The Settlement Administrator also disseminated
26 news of the settlement via press release, and also provided timely CAFA notice pursuant to 28
27 U.S.C. § 1715. Heffler Decl. at ¶¶ 4, 14.

1
2 **B. Targeted Online Media Notice**

3 In compliance with the Order, Heffler implemented an online media campaign that included
4 Internet Banner ads appearing on Facebook, Twitter, and Millennial Mobile Media networks. The
5 program commenced on August 13, 2015 and was completed on September 12, 2015, delivering
6 more than 9,507,000 impressions. Internet banner ads provided information for visitors to self-
7 identify themselves as potential Class Members, where they may “click” on the banner and then
8 link directly to the official settlement website for more information including frequently asked
9 questions and important court documents. *See* Heffler Decl. at ¶ 13.

10 **C. Settlement Website and Toll-Free Number**

11 On or about August 10, 2015, the Settlement Administrator established a Settlement
12 Website (www.thebodyshoptextsettlement.com) which contains the following: the Settlement
13 Agreement and accompanying Notices; the Preliminary Approval Order, and the Revised
14 Preliminary Approval Order; Class Counsel’s Motion for Attorneys’ Fees; Frequently-Asked
15 Questions; the toll-free number; and an online contact form for individuals to determine whether
16 they are included in the Settlement Class. *See* Heffler Decl. at ¶¶ 7-8.

17 **D. Settlement Administration Costs**

18 The costs of settlement administration as of September 30, 2015 totals \$87,583.35. *See*
19 Heffler Decl. at ¶ 17. Costs are not expected to exceed \$130,000.00. The Court has approved
20 payment of up to \$135,000.00 of the costs of the Settlement Administrator from the common fund.
21 *See* [Doc. 29]. As an additional benefit to Class Members, these costs are borne by Defendant
22 TBS.

23 **IV. THE CLASS HAS RESPONDED POSITIVELY TO THE SETTLEMENT**

24 The response from the Class thus far has been very positive. The deadline for Class
25 Members to submit exclusions/objections has passed and no members of the Class have excluded
26 themselves from the Settlement and none have objected to the Settlement. *See* Heffler Decl. at
27 ¶ 18.

1
2 **V. THE COURT SHOULD GRANT FINAL APPROVAL TO THE SETTLEMENT**

3 Federal courts strongly favor and encourage settlements, particularly in class actions and
4 other complex matters, where the inherent costs, delays, and risks of continued litigation might
5 otherwise overwhelm any potential benefit the class could hope to obtain. *See Class Plaintiffs v.*
6 *City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992) (noting the “strong judicial policy that favors
7 settlements, particularly where complex class action litigation is concerned”); *see also* 4 *Newberg*
8 *on Class Actions* § 11.41 (4th Ed. 2002) (citing cases).

9 The traditional means for handling claims like those at issue here—individual litigation—
10 would require a massive expenditure of public and private resources and, given the relatively small
11 value of the claims of the individual Class Members, would be impracticable. Thus, the proposed
12 Settlement is the best vehicle for Class Members to receive the relief to which they are entitled in a
13 prompt and efficient manner. The *Manual for Complex Litigation* (Fourth) (2004) § 21.63 (“MCL”)
14 describes a three-step procedure for approval of class action settlements:

15 (1) Preliminary approval of the proposed settlement at an informal hearing; (2)
16 Dissemination of mailed and/or published notice of the settlement to all affected
17 class members; and (3) A “formal fairness hearing” or final settlement approval
18 hearing, at which class members may be heard regarding the settlement, and at
which evidence and argument concerning the fairness, adequacy, and
reasonableness of the settlement may be presented.

19 This procedure, used by courts in the Ninth Circuit and endorsed by class action commentator
20 Professor Newberg, safeguards class members’ due process rights and enables the court to fulfill its
21 role as the guardian of class interests. 4 *Newberg* § 11.25. The first two steps in this process have
22 occurred. With this motion, Plaintiff respectfully requests that the Court take the third and final step
23 in the process by granting final approval of the settlement.

24 **A. The Settlement is Fair, Adequate, and Reasonable and Should be Approved**

25 It is well settled that the law favors the compromise and settlement of class action suits.
26 *See Churchill Village, LLC v. Gen. Elec.*, 361 F.3d 566, 576 (9th Cir. 2004); *Class Plaintiffs v.*
27 *City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992); *Officers for Justice v. Civil Serv. Comm’n*,
28

1 688 F.2d 615, 625 (9th Cir. 1982) (“[V]oluntary conciliation and settlement are the preferred
2 means of dispute resolution. This is especially true in complex class action litigation....”).

3 A proposed class action settlement should be approved if the Court, after allowing absent
4 class members an opportunity to be heard, finds that the settlement is “fair, reasonable, and
5 adequate.” Fed. R. Civ. P. 23(e)(2). When assessing a proposed settlement, “the court’s intrusion
6 upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit
7 must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the
8 product of fraud or overreaching by, or collusion between, the negotiating parties, and the
9 settlement, taken as a whole, is fair, reasonable and adequate to all concerned.” *Officers for*
10 *Justice*, 688 F.2d at 625.

11 Courts in the Ninth Circuit consider a number of factors in evaluating class settlements,
12 recognizing that “it is the settlement taken as a whole, rather than the individual component parts,
13 that must be examined for overall fairness.” *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir.
14 2003). The Ninth Circuit has set forth the following list of factors to be considered: (1) the
15 strength of the plaintiffs’ case; (2) the risk, expense, complexity, and likely duration of further
16 litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount
17 offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6)
18 the experience and views of counsel; (7) the presence of a governmental participant; and (8) the
19 reaction of the class members to the proposed settlement. *Churchill Village*, 361 F.3d at 575.

20 Application of these factors here confirms that the settlement is fair, reasonable, and
21 adequate, and should be finally approved.

22 **1. The Strength of the Case and the Risk, Expense, Complexity, and Likely**
23 **Duration of Further Litigation**

24 Plaintiff and the Class continue to believe that their claims against TBS have merit and that
25 they could make a compelling case if their claims were tried. If Plaintiff and the Class were to
26 prevail, TBS could face hefty statutory penalties. *See* Hornberger Decl. at ¶ 7. Nevertheless, it is
27 apparent that Plaintiff and the Class would face a number of difficult challenges if the litigation
28 were to continue. *Id.* TBS has denied liability for the claims Plaintiff has asserted. Further, both at

1 the time of the settlement was reached and afterwards, the strength or weakness of Plaintiff's
2 individual claims, as well as those of putative class members, remained of uncertain resolution.
3 Among other things, the potential for retroactive waiver of the October 2012 consent requirements,
4 as well as the uncertainty regarding the definition of ATDS, meant that some or all of the claims
5 might fail on the merits, or prove incapable of classwide adjudication, And even if Plaintiff were to
6 obtain certification, and she and the Class were to ultimately prevail at trial, a result that is not
7 guaranteed, they likely face a long and costly appeals process, that would depend in large part on
8 the outcome of pending proceedings before the D.C. Circuit Court of Appeal. *Id.*

9 **2. The Risk of Maintaining Class Action Through Trial**

10 While Plaintiff continues to believe that class certification would be achievable, TBS
11 consistently argued that class certification would be inappropriate in these actions due to the
12 question of whether Class Members provided express written consent to the calls at issue. *Id.* at ¶ 8.
13 If the Court were to accept TBS's position, it is likely that no class would be certified and that
14 judgment would be entered in favor of TBS. *Id.* Considering the fact that Courts have been divided
15 as to whether issues of "prior express consent" (let alone "express written consent") can be
16 adjudicated class-wide (*compare Meyer v. Portfolio Recovery Associates*, 707 F.3d 1036, 1042 (9th
17 Cir. 2012) (upholding class certification) *with Gene And Gene LLC v. BioPay LLC*, 541 F.3d 318,
18 328 (5th Cir. 2008) (reversing class certification)), if TBS were able to present convincing facts to
19 support its position, there is a risk that the Court would decline to certify the Class, leaving only the
20 named Plaintiff to pursue her individual claims. *Id.*

21 In addition, there were substantial risks in continuing this litigation. The application of the
22 2012 consent requirements, the potential availability of a waiver as to such requirements, and the
23 outcome of the pending proceedings before the D.C. Circuit regarding the scope of the ATDS
24 definition would impact the claims of Plaintiff and putative class members, both on the merits and
25 in their suitability for classwide adjudication. *Id.* at ¶9.

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1 3. *The Amount Offered in the Settlement*

2 Critically, the Settlement provides for a *direct benefit* to each Settlement Class Member,
3 meaning there is no claims process under which a Class Member is required to submit a claim form
4 to receive a Gift Card. Each Settlement Class Member will be directly issued a Gift Card in the
5 amount of \$25.00. Thus, all Settlement Class Members (i.e., those who do not opt out) need take
6 no action to receive the benefits of the Settlement. Courts have routinely approved such
7 settlements. *See Shames v. Hertz Corp.*, 2012 WL 5392159 at *13 (S.D. Cal. Nov. 5, 2012)
8 (settlement was fair where the parties “negotiated a settlement that provide[d] direct payment to
9 class members”); *Hopson v. Hanesbrands Inc.*, 2009 WL 928133, at *11 (N.D. Cal. Apr. 3, 2009)
10 (“the benefits can be accurately traced because they are [] payments directly to Class Members”);
11 *Briggs v. United States*, 2010 WL 1759457 (N.D. Cal. Apr. 30, 2010) (settlement was fair where it
12 did not require class members to file claim forms).

13 The benefit each Settlement Class Member will receive is fair, appropriate, and reasonable
14 given the purposes of the TCPA and in light of the anticipated risk, expense, and uncertainty of
15 continuing the Action. Although the TCPA provides for statutory damages of \$500 per violation, it
16 is well-settled that a proposed settlement may be acceptable even though it amounts to a percentage
17 of the potential recovery that might be available to the class members at trial. *See e.g., National*
18 *Rural Tele. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 527 (C.D. Cal. 2004) (“well settled law that a
19 proposed settlement may be acceptable even though it amounts to only a fraction of the potential
20 recovery”); *In re Global Crossing Sec. and ERISA Litig.*, 225 F.R.D. 436, 460 (E.D. Pa. 2000)
21 (“the fact that a proposed settlement constitutes a relatively small percentage of the most optimistic
22 estimate does not, in itself, weigh against the settlement; rather, the percentage should be
23 considered in light of the strength of the claims”).

24 And as the Ninth Circuit Court of Appeal has recently confirmed, a gift card are treated
25 under federal statute “as an electronic form of cash.” *In re Online DVD-Rental Antitrust Litig.*,
26 779 F.3d 934, 953 (9th Cir. 2015), citing 15 U.S.C. § 1693l-1 (affirming \$12 gift card class
27 settlement benefit). And here, the gift cards provided to Class Members are freely transferrable and
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1 do not expire (Agreement at 1.11), along the lines endorsed by the Ninth Circuit and district courts
 2 within this Circuit. *See id.* at 951 (citing with approval multiple settlements that awarded
 3 transferrable and non-expiring gift cards as class benefit).

4 ***4. The Extent of Discovery Completed and the Stage of the Proceedings***

5 The Settlement was informed by Class Counsel's thorough investigation and analysis of
 6 the factual and legal issues involved. *See Hornberger Decl.* at ¶ 11. In addition, prior to engaging
 7 in settlement negotiations, the parties had fully briefed TBS's Motion to Dismiss or Motion to Stay.
 8 *Id.*

9 Once the parties agreed to engage in settlement negotiations, they informally exchanged
 10 pertinent information and documents including case law and relevant rulemaking by the FCC. *Id.*
 11 The parties also exchanged and reviewed informal post-settlement discovery to ensure that the
 12 information exchanged during negotiations regarding call record data and the scope and size of the
 13 class was complete and accurate. *Id.* Through this exchange, the parties thoroughly explored their
 14 respective positions on the merits of the action, the viability of class certification, and damages. *Id.*

15 Accordingly, while the action was settled prior to class certification, the final terms of
 16 settlement were agreed to only after Class Counsel thoroughly vetted the claims and potential
 17 damages through the exchange of both informal and formal discovery, and participated in lengthy
 18 arm's length negotiations. *Id.*

19 ***5. The Experience and View of Class Counsel***

20 Class Counsel have a keen understanding of the legal and factual issues involved in this
 21 case. *See Hornberger Decl.* at ¶ 12. Class Counsel fully endorse the settlement as fair, adequate,
 22 and reasonable. *Id.* The fact that qualified and well-informed counsel endorse the settlement as
 23 being fair, reasonable, and adequate weighs heavily in favor of the Court approving the settlement.
 24 *See In re Omnivision Technologies, Inc.*, 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2007) (*quoting*
 25 *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 622 (N.D. Cal. 1979)) ("The recommendations of
 26 plaintiffs' counsel should be given a presumption of reasonableness."); *Linney v. Cellular Alaska*
 27 *P'ship*, No. C-96-3008 DLJ, 1997 U.S. Dist. LEXIS 24300, at *16 (N.D. Cal. July 18, 1997) ("The
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1 involvement of experienced class action counsel and the fact that the settlement agreement was
2 reached in arm's length negotiations, after relevant discovery had taken place create a presumption
3 that the agreement is fair.").

4 **6. The Presence of a Governmental Participant**

5 No governmental agency is directly involved in this lawsuit. *See* Hornberger Decl. at ¶ 13.
6 To date, no governmental entity has raised objections or concerns about the Settlement. *Id.*

7 **7. The Reaction of Class Members**

8 To date, there have no exclusions and no objections to the settlement. That provides
9 abundant support for the fact that this settlement has been well-received by members of the Class.
10 *See* Heffler Decl. at ¶ 18. This fact further supports that the settlement is fair, adequate, and
11 reasonable, and should be approved.

12 **8. The Settlement is the Product of Arm's Length Negotiations**

13 In addition to considering the above factors, the Ninth Circuit has indicated that the court
14 should carefully review the settlement for any signs of collusion or conflicts of interest. *See In re*
15 *Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011). As detailed above, the
16 Settlement is the result of lengthy, adversarial arm's-length negotiations between attorneys
17 experienced in the litigation, certification, trial, as well as a full-day mediations presided over by a
18 well-respected mediator, the Hon. Fred K. Morrison (Ret.). Further, none of the factors identified
19 in *In re Bluetooth* as a sign of potential collusion is present here. In particular, class counsel is not
20 receiving a disproportionate distribution of the settlement; instead the amount sought is less than
21 25% of the total settlement benefit obtained. *See Laguna v. Coverall North America, Inc.*, 753 F.3d
22 918, 925 (9th Cir. 2014)(where fee award is reasonable, "the chance of collusion narrows to a slim
23 possibility"). Further, class counsel is paid out of the Settlement Benefit (*see* Agreement at 1.26),
24 and rather than any "reversion to defendants of unclaimed funds" (*see ibid.*), the settlement directly
25 provides a gift card benefit to each class member. Accordingly, considered as a whole and
26 balancing all terms the settlement, the Settlement should be approved. *See ibid.* (district court
27 should balance all provisions of the settlement).

1 **VI. CONCLUSION**

2 For all of the foregoing reasons, Plaintiff respectfully requests that the Court enter an
3 Order granting final approval of the Settlement.

4 DATED: October 23, 2015

HORNBERGER LAW CORPORATION

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7 NATHAN VERBISCAR-BROWN, ESQ.
8 CLASS COUNSEL
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